DEC 13 2000

No. 00-46

IN THE

Supreme Court of the United States

BRUCE G. MURPHY,

Petitioner,

v.

JEFFREY H. BECK,
as Successor Agent for the Southeast Bank, N.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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The Respondent, Jeffrey H. Beck, as successor agent for Southeast Bank, N.A., respectfully requests this Court to affirm the Eleventh Circuit's decision in all respects.

STATEMENT OF THE CASE

Murphy's amended complaint in the District Court for the District of Columbia alleges that he invested approximately $500,000 in Orchid Island Associates Limited Partnership (Orchid) as a limited partner in 1989. App. 3. According to the complaint, Murphy was solicited by Orchid to make his investment and he did so in reliance on false representations of his potential return on the investment. App. 4-6.

Southeast Bank (Southeast) loaned Orchid approximately $50 million between August 1988 and January 1990. App. 3-4. Murphy's complaint alleged that Southeast either "knew, acted recklessly with respect to, and/or should have known of the fraudulent representations and activities" by Orchid's principals. App. 7. Murphy further alleged that "Southeast's involvement and control . . . of Orchid was so extensive and complete as to constitute Southeast a de facto partner, co-agent of, and joint venturer with . . . Orchid." App. 8. Murphy claims that "Southeast's conduct constituted total dominion over the development such as to deprive Orchid of its own will, rendered Orchid subservient to the interests and directions of Southeast," thus establishing an independent legal obligation owed by Southeast to Orchid and Murphy separate and apart from the relationship created by the loan documents. App. 16. Murphy listed a plethora of alleged wrongful acts and omissions by Orchid between 1988 and 1991, all of which acts led to Orchid's ultimate inability to meet its loan obligations to Southeast. App. 3-20.

On August 2, 1991, Southeast brought a foreclosure action against Orchid. App. 19. Southeast was declared insolvent on September 19, 1991, and the Federal Deposit Insurance Corporation (FDIC), as receiver, sold the Orchid loans to First Union National Bank of Florida, N.A. (First Union). *Id.* The Orchid project was sold by First Union at a foreclosure

sale on May 27, 1993. *Id.* According to the complaint, Murphy's investment in Orchid is "worthless" and the FDIC, as receiver, "is in possession of a large surplus." App. 19 and 20.

In the District Court for the District of Columbia, the FDIC moved to dismiss several of the counts under the doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and 12 U.S.C. § 1823(e). Pet. App. B3. The district court granted the FDIC's motion, *id.* at B4-B9, and the Court of Appeals for the D.C. Circuit reversed that ruling, holding that the *D'Oench* doctrine had been preempted by the 1989 adoption of 12 U.S.C. § 1821(d)(9). *Murphy v. FDIC*, 61 F.3d 34 (D.C. Cir. 1995). Following the D.C. Circuit's remand, the district court, on its own motion, transferred Murphy's action to the Southern District of Florida. Pet. App. D. Following the transfer, the FDIC moved to substitute Jeffrey H. Beck, as Successor Agent for Southeast as the party defendant "in the place and stead of the FDIC, which was previously the Receiver of [Southeast]." Pet. App. E1.[1] Thereafter, the district court ruled on the FDIC's previously-filed motion to dismiss. App. 49-54.[2]

The court first ruled that Murphy could not state a cause of action against the FDIC. App. 52-54.[3] Then, in accordance with

1. As noted in the Brief for Petitioner at 7-8, Beck was appointed the Successor Agent upon completion of the FDIC's receivership duties.

2. Murphy's amended complaint, to which reference has been made in the text, was filed after the D.C. Circuit's decision. App. 51.

3. Addressing Murphy's claim that a joint venture relationship had existed between Southeast and Orchid, the district court noted that "there are no documents creating a joint venture between Southeast and Orchid" and that the loan agreements "expressly reject a joint venture." App. 52. The court accordingly concluded that "[n]o joint venture existed between Southeast and Orchid." *Id.* The court also rejected Murphy's argument that, as a third party, he could "establish the existence of a joint venture or de facto partnership relationship notwithstanding a purported disclaimer of a joint venture between the alleged joint venturers." App. 53. Indeed, the court remarked that

(Cont'd)

Eleventh Circuit precedent, the district court applied the *D'Oench* doctrine to bar Murphy's claim. App. 53-54. The court held that "absent a written document," Murphy cannot state a claim against the FDIC based on "transactions that do not appear on the bank's books." *Id.*

The Eleventh Circuit elected to address only the *D'Oench*-based ground for dismissal. App. 56-59.[4] After addressing at some length — and rejecting — Murphy's attempt to argue that the Eleventh Circuit should apply the law of the D.C. Circuit to address the *D'Oench* issue,[5] the Eleventh Circuit rebuffed Murphy's argument that this Court's decisions in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), and *Atherton v. FDIC*, 519 U.S. 213 (1997), require a holding that *D'Oench* has been supplanted by the 1989 adoption of 12 U.S.C. § 1823(e) and 1821(d)(9), relying on the controlling *en banc* decision in *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 120 F.3d 1140 (11th Cir. 1997) (*en banc*), *cert. denied*, 523 U.S. 1093 (1998). App. 68-72.

SUMMARY OF ARGUMENT

Born of the Great Depression and annealed in the savings and loan crisis of the 1980s, the *D'Oench* doctrine has withstood the test of time as a hardy common-law principle. Reduced to its essence, the doctrine forbids the use of a secret agreement, *i.e.*, one not maintained in the ordinary records of a financial institution, as a basis either to defend against a claim brought

(Cont'd)

"Murphy, by virtue of his investment, was a limited partner in Orchid" and therefore "a party to, and bound by, the agreements" between Southeast and Orchid. *Id.* Additionally, the court determined that Murphy had failed to allege the existence of a joint venture under Florida law. *Id.*

4. As Murphy correctly notes, the other grounds relied on by the district court for dismissal "would remain open on remand." Brief for Petitioner at 8 n.5.

5. The correctness of the Eleventh Circuit's ruling on this point was not raised in the certiorari petition and is not before this Court.

by the FDIC (or another federal banking regulatory agency) or to bring an affirmative claim against the agency. The dual public policies effectuated by the doctrine are: (i) maintaining public confidence in the banking system (particularly in times of economic upheaval) and (ii) ensuring that the FDIC readily and quickly can ascertain the financial status of an insolvent institution when making the critical decision whether to liquidate the institution or sell the assets to another institution. Because the FDIC's decision must be made with great dispatch, often overnight, protecting the FDIC from defenses or claims based upon agreements that are not reflected in the bank records is of paramount importance.

The *D'Oench* doctrine was partially codified in 1950, and there has never been even a suggestion that the Congress intended to supplant or discard the doctrine in that statutory enactment. The doctrine lay dormant until the late 1970s, when the first signs of the growing savings and loan crisis began to appear, and came into its own as an essential component of regulatory law as that crisis escalated in the 1980s. *D'Oench* protection was extended to the FDIC in its receivership capacity, to the FSLIC, and to transferees or assignees of those agencies. Because barring defenses arising from secret agreements is essentially meaningless if parties can bring affirmative claims against the FDIC based upon such agreements, it became universally accepted that *D'Oench* barred such claims. During this turbulent period, there was never any question but that *D'Oench* and its statutory analogue, 12 U.S.C. § 1823(e), were to be construed in tandem so as to serve the dual purposes of the doctrine.

With the enactment of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) in 1989, the Congress elected to leave unaltered the substance of Section 1823(e) as that statute had originally been enacted in 1950, with one important expansion — the inclusion of the FDIC in its receivership capacity. *D'Oench* protection was also extended to "bridge banks" and to the newly-created Resolution Trust Corporation (RTC). Many of the other refinements and

interpretations of *D'Oench* were incorporated in a new provision, 12 U.S.C. § 1821(d)(9)(A), into which the Congress codified the common-law prohibition on affirmative claims against the FDIC based upon secret agreements that do not pass muster under Section 1823(e).

The Congress, however, did not elect to expand the scope of Section 1823(e). Thus, the statutory language limiting its application to "specific assets" acquired by the FDIC or RTC was left unchanged. Also, the Congress did not address the question whether assignees or transferees are within the scope of Sections 1823(e) or 1821(d)(9)(A). A conflict quickly arose among the Circuits on the question whether *D'Oench* survived FIRREA, with the D.C. Circuit ruling that the enactment of Section 1821(d)(9)(A), the absence of any indicium of Congressional intent notwithstanding, had eradicated the doctrine, *Murphy v. FDIC*, 61 F.3d 34 (D.C. Cir. 1995), and the Eleventh Circuit applying the presumption announced in *United States v. Texas*, 507 U.S. 529 (1993), to conclude that *D'Oench* survives FIRREA, *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 83 F.3d 1317 (11th Cir. 1996) (*en banc*), *vacated and remanded, sub nom. Hess v. FDIC*, 519 U.S. 1087 (1997), *on remand*, 120 F.3d 1140 (11th Cir. 1997) (*en banc*), *cert. denied*, 523 U.S. 1093 (1998). A minority of the other Circuits have chosen one course or the other, but most have not yet addressed the issue squarely.

Murphy's efforts to turn the Court away from the *Texas* presumption are unavailing. *D'Oench* cannot be seen as anything other than a proper, and long-established, federal common-law doctrine that cannot be deemed to have been carelessly overlooked or lightly discarded by the Congress, particularly in the absence of any ascertainable legislative intent to do so. There is neither precedential nor historical support for Murphy's passing argument that the 1950 enactment of Section 1823(e) eviscerated *D'Oench*, so that the question can be transformed into whether this Court should promulgate a hitherto-unknown

common-law principle. In the absence of clear Congressional intent to preempt the common-law *D'Oench* doctrine, the presumption that the doctrine survives must prevail.

Finally, Murphy's assertions that *D'Oench* survives in only its most minimalist incarnation, *i.e.*, as a doctrine applicable only to the FDIC in its corporate capacity and only to bar defenses based upon written agreements, should readily be rejected. When this Court announces a principle of federal common law, as it unmistakably did in the *D'Oench* decision, it does so with the sure and certain understanding that the common law is not static and immutable. The courts of appeals, confronted with a bewildering array of disputes arising from the failures of financial institutions in the 1980s and early 1990s, carefully molded and shaped the doctrine, impelled to a very significant extent by this Court's declaration of the policy goals of the doctrine in *Langley v. FDIC*, 484 U.S. 86 (1987). There is no principled basis upon which to parse the doctrine and proclaim that certain parts survive, while others do not, and the Court should not accept Murphy's invitation to do so.

ARGUMENT

I. The *D'Oench* Doctrine.

A. The Derivation of the Doctrine.

Four years after declaring in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), that "[t]here is no federal general common law," *id.* at 78, this Court created the federal common-law doctrine that a "secret agreement" that is not maintained in a bank's records does not operate as a defense against a suit by the FDIC to recover on a note. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 460 (1942). The Court discerned the existence of "a federal policy to protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures or to which it makes loans."

315 U.S. at 457.[6] The FDIC was created in 1933, *see* Banking Act of 1933, Pub. L. No. 73-66, § 8, 48 Stat. 162, 168, to "safeguard the deposits of the general public and increase public trust in the banking system" after the disastrous bank runs and bank failures during the early years of the Great Depression. J. Michael Echevarria, *A Precedent Embalms a Principle: The Expansion of the D'Oench, Duhme Doctrine*, 43 CATH. U. L. REV. 745, 752-54 (1994) (hereinafter *Expansion of D'Oench*). The Court declared the existence of a "federal policy evidenced in this Act to protect [the FDIC], a federal corporation, from misrepresentations made to induce or influence the action of [the FDIC], including misstatements as to the genuineness or integrity of securities in the portfolio of banks which it insures or to which it makes loans." *D'Oench*, 315 U.S. at 459.

The dispute in *D'Oench* arose from the sale of bonds by D'Oench, Duhme & Co. to the Belleville Bank & Trust Co., which bonds later went into default. 315 U.S. at 454. D'Oench provided the bank with "accommodation notes," *i.e.*, notes that would not be called, for the purpose of keeping the past due bonds from appearing among the bank's assets. When the FDIC acquired the notes as part of collateral securing a $1 million

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6. Section 12B(s) of the Federal Reserve Act, 12 U.S.C. § 264(s) (1935), punished as a criminal offense the making of "any statement, knowing it to be false, or willfully overvalu[ing] any security" for the purpose of "obtaining any loan" from the FDIC or "influencing in any way" an action of the FDIC. *D'Oench*, 315 U.S. at 446-47 (quoting 12 U.S.C. § 264(s)). The Court relied on the pellucid federal policy of that statute and on its prior decision in *Deitrick v. Greaney*, 309 U.S. 190 (1940). There, the Court had applied another criminal banking statute to prohibit a bank director from defending against a receiver's claim under a note based upon an alleged "secret and illegal agreement" that the bank would not demand payment on a note. *Id.* at 196 ("it is enough for present purposes that the respondent, after placing his note among the bank's receivables . . . as the means for avoiding the consequences of violation of the statute, may not now take the benefit of the secret and illegal agreement that his note except for purposes of deceiving the bank examiners was to be regarded as a nullity").

loan made by the FDIC in connection with an assumption of the bank's deposit liabilities by another institution, it brought an action against D'Oench to recover on the notes. 315 U.S. at 453-54. While agreeing that D'Oench had not acted to deceive the FDIC in providing the accommodation notes (because the FDIC had not been created at the time of the transaction), and that no criminal offense had occurred, the Court held that "the inability of an accommodation maker to plead the defense of no consideration does not depend on his commission of a penal offense." 315 U.S. at 460. Rather, announcing the principle that has informed the precedents for the last 58 years, the Court held:

> The test is whether the note was designed to deceive the creditors or the public authority or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which [the FDIC] relied in insuring the bank was or was likely to be misled. . . . It needs no argument to demonstrate that the integrity of ostensible assets has a direct relation to solvency. . . . The federal policy expressed in the Act . . . is not dependent on proof of loss or damage caused by the fraudulent practice.
>
> Though [D'Oench] was not a participant in this particular transaction and, so far as appears, was ignorant of it, nevertheless it was responsible for the creation of the false status of the note in the hands of the bank. It therefore cannot be heard to assert that the federal policy to protect [the FDIC] against such fraudulent practices should not bar its defense to the note. . . . If the secret agreement were allowed as a defense in this case the maker of the note would be enabled to defeat the purpose of the statute by taking advantage of an undisclosed and fraudulent arrangement which the statute condemns and which the maker of the note made possible. . . .

Id. at 460-62.

In announcing this rule, the Court was fully aware of *Erie's* limitations. Indeed, Justice Frankfurter, in his concurring opinion, argued that the dispute should have been resolved under state law, rather than as a matter of federal common law. 315 U.S. at 463-65 (Frankfurter, J. concurring). Justice Jackson spoke directly to the question:

> Although by Congressional command this case is to be deemed one arising under the laws of the United States, no federal statute purports to define the Corporation's rights as a holder of the note in suit for the liability of the maker thereof. There arises, therefore, the question whether in deciding the case we are bound to apply the law of some particular state or whether, to put it bluntly, we may make our law from materials found in common-law sources.
>
> This issue has a long historical background of legal and political controversy as to the place of the common law in federal jurisprudence. . . . The federal courts have no general common law, as in a sense they have, no general or comprehensive jurisprudence of any kind, because many subjects of private law which bulk large in the traditional common law are ordinarily within the province of the states and not of the federal government. But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law.
>
> I do not understand Justice Brandeis's statement in *Erie R. Co. v. Tompkins*, that "There is no federal general common law," to deny that the

> common law may in proper cases be an aid to or the basis of decision of federal questions. In its context it means to me only that federal courts may not apply their own notions of the common law at variance with applicable state decisions except "where the Constitution, treaties, or statutes of the United States [so] require or provide.". . . .
>
> Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.

315 U.S. at 468-70 (Jackson, J. concurring) (citations and footnote omitted). This Court's subsequent decisions noted *D'Oench* as a valid declaration of federal common-law principles. *E.g., United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947); *Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945).[7]

B. The 1950 Amendments to the Federal Deposit Insurance Act.

1. The enactment.

Eight years after *D'Oench*, the Congress amended the Federal Deposit Insurance Act, *see* Pub. L. No. 81-797, § 2, 64 Stat. 873, 879 (1950), to, among other things, create the provisions of 12 U.S.C. § 1823(e) (1950):

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution an official record of the bank.

12 U.S.C. § 1823(e) (1982).[8]

7. Neither this Court nor the courts of appeals, however, had immediate occasion to apply *D'Oench* as a substantive rule of law. It appears that the only reported decision applying the *D'Oench* principle between 1942 and 1970 is the Third Circuit's decision in *FDIC v. Alker*, 151 F.2d 907 (3d Cir. 1945), *cert. denied*, 327 U.S. 799 (1946). *See Expansion of D'Oench, supra* at 771 & n.178.

2. The effect of the statute.

Section 1823(e) had the effect of making the common-law principles of *D'Oench* "both more encompassing and more precise." *FDIC v. O'Neil*, 809 F.2d 350, 353 (7th Cir. 1987). The statute is narrower because it is applicable only to specific assets of an insolvent institution, but it is broader because it applies regardless of the customer's blameworthiness. *E.I. du Pont de Nemours & Co. v. FDIC*, 32 F.3d 592, 597 (D.C. Cir. 1994); *FDIC v. Van Laanen*, 769 F.2d 666, 667 (10th Cir. 1985); *FDIC v. Blue Rock Shopping Center, Inc.*, 766 F.2d 744, 753 (3d Cir. 1985); *Expansion of D'Oench, supra* at 769-70. Moreover, Section 1823(e) did not apply to the FDIC in its receivership capacity, to the Federal Savings and Loan Insurance Corporation (FSLIC), or to transferees of assets from banking regulatory agencies. Given the paucity of legislative history, the lack of any limitation based upon relative culpability, and

8. As originally enacted, Section 1823(e) included a provision authorizing the FDIC to engage in purchase and assumption transactions. 12 U.S.C. § 1823(e) (1950). This provision was moved to another section of Title 12 by the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 112, 92 Stat. 1469. The version of Section 1823(e) quoted in the text reflects the 1982 amendment. In 1994, the statute was reorganized and the quoted text was renumbered as Section 1823(e)(1). *See* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 317, 108 Stat. 2160, 2223. Because the statute existed as Section 1823(e) at all times pertinent to this case, it will be so designated in this brief.

the absence of an estoppel element, Section 1823(e) is perhaps best seen as a "prophylactic rule making certain agreements strictly unenforceable and can be viewed as a federal statute of frauds and corporate authority requirement." *Expansion of D'Oench, supra* at 770-71 (footnote omitted). The legislative history of the 1950 Act was silent on the status of *D'Oench*, an omission that influenced the federal courts to conclude that Congress had not preempted *D'Oench* in 1950. *FDIC v. McClanahan*, 795 F.2d 512, 514 n.1 (5th Cir. 1986); *In re NBW Commercial Paper Litigation*, 826 F. Supp. 1448, 1459 (D.D.C. 1992).[9]

C. The Development of the Doctrine (1980-89).

1. Overview.

With the onset of the savings and loan crisis in the early 1980s, the courts of appeals were called upon to address the scope of the *D'Oench* doctrine. As the wave of insolvencies crested, the overarching public policy concern was that the FDIC must be able readily to discern the institution's financial status upon stepping in after a declaration of insolvency by the Comptroller of the Currency. *Langley v. FDIC*, 484 U.S. 86, 91-92 (1987). This is so because the FDIC has two alternatives for dealing with an insolvent institution: (i) liquidation, which has the disadvantage of "weaken[ing] confidence in the banking system" and causing "substantial delay in returning funds to depositors"; and (ii) the "preferred option" of a purchase and assumption agreement, whereby "the FDIC, in its capacity as receiver, sells the bank's healthy assets . . . in exchange for the purchasing bank's promise to pay the failed bank's depositors,"

9. The FDIC's chairman testified before the House of Representatives Committee on Banking and Currency, during the hearings on the 1950 amendments, that the proposed legislation "may be characterized as a codification of the law pertaining to the Federal Deposit Insurance Corporation." Amendments to Federal Deposit Insurance Act, 1950: Hearings on S. 2822 Before the House Comm. on Banking and Currency, 81st. Cong., 2nd Sess. 19 (1950) (statement of Maple T. Harl, Chairman FDIC).

sells "the 'bad' assets to itself acting in its corporate capacity," and "[w]ith the money it receives, . . . pays the purchasing bank enough money to make up the difference between what it must pay out to the failed bank's depositors." John B. Shumadine, *Striking a Balance: Statutory Displacement of Established Federal Common Law and the D'Oench Doctrine in Murphy v. F.D.I.C. and Motorcity of Jacksonville, Ltd. v. Southeast Bank*, 51 ME. L. REV. 129, 144 (1999) (hereafter *Striking a Balance*). If the FDIC opts for a purchase and assumption, the transaction must necessarily be "consummated with great speed." *Gunter v. Hutcheson*, 674 F.2d 862, 865-66 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982).

2. Interpretations of *D'Oench*.

Because the precise provisions of Section 1823(e) failed adequately to protect the FDIC against secret agreements, the *D'Oench* doctrine, enjoying a resurgence, provided the federal courts with the necessary tools to do so. First, making explicit an assumption that had existed since at least 1945, *see FSLIC v. Kearney Trust Co.*, 151 F.2d 720, 725 (8th Cir. 1945), the doctrine was made applicable to the FSLIC. *E.g., FSLIC v. Two Rivers Associates, Inc.*, 880 F.2d 1267, 1274-75 (11th Cir. 1989); *Mainland Savings Association v. Riverfront Associates, Ltd.*, 872 F.2d 955, 956 (10th Cir.), *cert. denied*, 493 U.S. 890 (1989); *Firstsouth, F.A. v. Aqua Construction, Inc.*, 858 F.2d 441, 442 (8th Cir. 1988); *Andrew D. Taylor Trust v. Security Trust Federal Savings and Loan Association*, 844 F.2d 337, 342 (6th Cir. 1988).[10] The doctrine was also extended to the FDIC and to the FSLIC in their receivership roles.

10. The FSLIC was created in 1934 as part of the Federal Home Loan Bank Board. *See* National Housing Act, Pub. L. No. 73-479, § 402, 48 Stat. 1246, 1256 (1934). The FSLIC's role was to insure depositors' accounts in qualifying savings and loan associations. *Id.* at § 403, 48 Stat. at 1257. With the advent of the FIRREA, the FSLIC was abolished, Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 401(a), 103 Stat. 183, 354, and the RTC assumed the FSLIC's existing receiver/conservator duties. 12 U.S.C. § 1441a(1).

E.g., FSLIC v. Two Rivers Associates, 880 F.2d at 1277; *FDIC v. McClanahan,* 795 F.2d at 516. Finally, the federal courts extended protection to "bridge banks," *e.g., Bell & Murphy and Associates v. Interfirst Bank Gateway, N.A.,* 894 F.2d 750, 754-55 (5th Cir.), *cert. denied,* 498 U.S. 895 (1990); *Kilpatrick v. Riddle,* 907 F.2d 1523, 1528 (5th Cir. 1990), *cert. denied,* 498 U.S. 1083 (1991), and to other third parties who acquire assets from the FDIC or the FSLIC. *E.g., Newton v. Uniwest Financial Corp.,* 967 F.2d 340, 347 (9th Cir. 1992); *Porras v. Petroplex Savings Association,* 903 F.2d 379, 381 (5th Cir. 1990); *Federal Land Bank of Jackson v. Shaffett,* 757 F. Supp. 22, 23-24 (M.D. La. 1991).[11]

Section 1823(e) did not define the scope of secret agreements to which the *D'Oench* doctrine applied, thus leaving it to the courts to address an ever-increasing variety of secret agreements as the savings and loan crisis worsened. Because "any other result would nullify the doctrine," *Kilpatrick v. Riddle,* 907 F.2d at 1528 (citation omitted), the courts of appeals extended protection under the *D'Oench* doctrine to affirmative claims, either in tort or contract, brought against either the FSLIC or the FDIC. *E.g., Robinowitz v. Gibraltar Savings,*

11. As will be discussed in the forthcoming analysis of the 1989 banking statutes, virtually all of these common-law applications of *D'Oench* have been codified, with the exception of the doctrine's applicability to successors in interest. While Murphy's primary challenge to the application of *D'Oench* appears to be premised upon the notion that a "private successor" should not be permitted to invoke the *D'Oench* doctrine, Brief for Petitioner at 14-18, it is a mere accident of timing that Beck, as a successor agent, was before the Eleventh Circuit and is now before this Court defending the dismissal of Murphy's complaint. Murphy brought his claims *against the FDIC* in 1992, following the failure of Southeast. App.2. The litigation proceeded to the D.C. Circuit's decision, *Murphy v. FDIC,* 61 F.3d 34 (D.C. Cir. 1995), and the subsequent transfer to the Southern District of Florida, following which transfer Beck was appointed as successor agent. Beck thus stands in the FDIC's shoes on the question whether Murphy validly could bring his action against the FDIC.

23 F.3d 951, 955 (5th Cir. 1994), *cert. denied,* 513 U.S. 1078 (1995); *OPS Shopping Center, Inc. v. FDIC,* 992 F.2d 306, 309-10 (11th Cir. 1993); *Newton,* 967 F.2d at 344; *Reding v. FDIC,* 942 F.2d 1254, 1259 (8th Cir. 1991); *Timberland Design, Inc. v. First Service Bank for Savings,* 932 F.2d 46, 49-50 (1st Cir. 1991); *Victor Hotel Corp. v. FCA Mortgage Corp.,* 928 F.2d 1077, 1083 (11th Cir. 1991).[12]

The scope of the *D'Oench* doctrine, prior to the enactment of the 1989 banking statutes, is perhaps best stated as follows:

> [A] private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution's records.

OPS Shopping Center, 992 F.2d at 308 (citation omitted).[13] The driving force behind these decisions is the recognition that any other result would erode the doctrine by "let[ting] technicalities stand in the way of principle." *Hall v. FDIC,* 920 F.2d 334, 340 (6th Cir. 1990) (citation omitted), *cert. denied,* 501 U.S. 1231 (1991). The FDIC cannot be assumed to be aware of unmemorialized agreements when it evaluates an institution's fiscal soundness to determine whether the institution should be liquidated or sold under a purchase and assumption agreement. The disallowance of affirmative claims against the FDIC, arising from such secret agreements, is essential to preserve the FDIC's

12. The primary articulated exception to this application of *D'Oench* is that so-called "free standing tort claims," that "do not implicate the records of regular banking transactions," may be brought against the FDIC as receiver of an insolvent institution. *OPS Shopping Center,* 992 F.2d at 310-11. That exception has not been asserted by Murphy.

13. Although decided in 1993, the *OPS Shopping Center* decision did not address the FDIC's arguments under the 1989 statutes but decided the dispute "on the basis of the common law *D'Oench* doctrine." *Id.* at 309 n.3.

ability to carry out its statutory role. *RTC v. Dunmar Corp.*, 43 F.3d 587, 592 (11th Cir.) (*en banc*), *cert. denied*, 516 U.S. 817 (1995).

3. *Langley v. FDIC.*

Many of the decisions cited above draw guidance from this Court's decision in *Langley v. FDIC*, 484 U.S. 86 (1987), this Court's single foray into the *D'Oench* doctrine since the 1942 announcement of that decision. *Langley* arose from a loan by the Planters Trust & Savings Bank (Planters), a Louisiana institution insured by the FDIC. *Id.* at 88. The loan was secured by a note, a mortgage and personal guarantees. *Id.* Three years after the loan, Planters brought an action in state court for nonpayment under the note and the Langleys removed the suit to federal court based upon diversity. *Id.* The case was consolidated with an action brought by the Langleys against Planters, seeking damages and alleging (in a mirror image of one of their defenses against the bank) that Planters had misrepresented the size and value of the property purchased with the loan proceeds. *Id.* at 88-89. "No reference to these representations appears in the documents executed by the Langleys, in the bank's records, or in the minutes of the bank's board of directors or loan committee." *Id.* at 89.

The bank was declared insolvent in 1984 and the FDIC was appointed as receiver. 484 U.S. at 89. Under a purchase and assumption transaction, Planters' deposit liabilities and assets were assumed by another institution and the FDIC obtained, among other things, the Langleys' note. *Id.* The FDIC was thereafter substituted as a plaintiff in the action originally brought by Planters and obtained a summary judgment in its favor. *Id.* at 89-90. The case came before this Court in 1987, under the then-existing provisions of 12 U.S.C. § 1823(e) (1982). *Id.* at 90. The Langleys sought to preserve their action and defenses on the basis that "the word 'agreement' in [Section 1823(e)] encompasses only an express promise to perform an act in the future." *Id.*

The Court first looked to general commercial principles to ascertain the proper interpretation of the word "agreement":

> As a matter of contractual analysis, the essence of petitioners' defense against the note is that the bank made certain warranties regarding the land, the truthfulness of which was a condition to performance of their obligation to repay the loan. As used in commercial and contract law, the term "agreement" often has "a wider meaning than . . . promise," and embraces such a condition upon performance. The Uniform Commercial Code, for example, defines agreement as "the bargain of the parties in fact as found in their language or by implication from other circumstances. . . ." Quite obviously, the parties' bargain cannot be reflected without including the conditions upon their performance, one of the two principal elements of which contracts are constructed. It seems to us that this common meaning of the word "agreement" must be assigned to its usage in § 1823(e) if that section is to fulfill its intended purposes.

Id. at 90-91 (citations omitted).

In language that guided the federal courts in their application of both the statute and the common-law doctrine, the Court explicated:

> One purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets. Such evaluations are necessary when a bank is examined for fiscal soundness by state or federal authorities, and when the FDIC is deciding whether to liquidate a failed bank or to provide financing for purchase of its assets (and assumption of its liabilities) by another bank. The last kind of evaluation, in particular, must be made "with great speed, usually overnight, in order to preserve the

going concern value of the failed bank and avoid an interruption in banking services." Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions.

A second purpose of § 1823(e) is implicit in its requirement that the "agreement" not merely be on file and in the bank's records at the time of an examination, but also have been executed and become a bank record "contemporaneously" with the making of the note and have been approved by officially recorded action of the bank's board or loan committee. These latter requirements ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure. Neither purpose can be adequately fulfilled if an element of a loan agreement so fundamental as a condition upon the obligation to repay is excluded from the meaning of "agreement."

Id. at 91-92 (citations omitted).

Finally, the Court turned to *D'Oench* to inform its construction of the statute:

> That "agreement" in § 1823(e) covers more than promises to perform acts in the future is confirmed by examination of the leading case in this area prior to enactment of § 1823(e) in 1950. In *D'Oench, Duhme & Co. v. FDIC*, the FDIC acquired a note in a purchase and assumption transaction. The maker asserted a defense of failure of consideration (that is the failure to perform a promise that was a condition precedent to the maker's performance), based on an undisclosed agreement between it and the failed bank that the note would not be called for payment. The Court held that this "secret agreement" could not be a defense to suit by the FDIC because it would tend to deceive the banking authorities. The Court stated that when the maker "lent himself to a scheme or arrangement whereby the banking authority . . . was likely to be misled," that scheme or arrangement could not be the basis for a defense against the FDIC. We can safely assume that Congress did not mean "agreement" in § 1823(e) to be interpreted so much more narrowly than its permissible meaning as to disserve the principle of *the leading case applying that term to FDIC-required notes. . . .*

Id. at 92-93 (citations omitted; emphasis added).

Langley provided much of the impetus for subsequent applications of the *D'Oench* doctrine. *E.g., Victor Hotel Corp.*, 928 F.2d at 1082 (*D'Oench* and *Langley* "immunize the FSLIC against defenses such as fraudulent inducement and misrepresentation"); *Kilpatrick*, 907 F.2d at 1527-28 (*Langley* establishes that "borrowers who execute facially unqualified obligations may not prevent a federal receiver's collection efforts by claiming that they were induced to execute the obligations by fraud"). In *Robinowitz v. Gibraltar Savings*, 23 F.3d 951 (5th Cir. 1994), the Fifth Circuit applied *Langley* to bar the plaintiff's claim against the RTC for breach of fiduciary duty by the insolvent institution:

> Robinowitz's claim is analogous to one for fraudulent inducement which is barred by *D'Oench, Duhme*. In *Langley*, the plaintiffs claimed that the Bank fraudulently induced them to borrow funds to invest in property by orally misrepresenting the size of the property. The Court held that the oral misrepresentation regarding the nature of the property was sufficient to constitute an "agreement" within the meaning of § 1823. It then held that even if the

> misrepresentation was fraudulent, § 1823 still barred a claim based on the representation unless it met the recording requirements. Robinwitz's claim that an oral misrepresentation fraudulently induced him to enter the settlement agreement, like the Langleys' claim that the bank's oral misrepresentation regarding the property induced them to borrow funds, is also barred by *D'Oench Duhme*.

23 F.3d at 955-56 (citations omitted). Similarly, in *OPS Shopping Center*, the Eleventh Circuit found support in *Langley* for barring an action against the FDIC based upon a letter of credit issued by the failed institution's president but never recorded in the files, records or board minutes of the bank. 992 F.2d at 308-09.[14]

II. FIRREA, *O'Melveny & Myers, Atherton v. FDIC, And Motorcity:* The *D'Oench* Doctrine After 1989.

A. The 1989 Statutes.

As the savings and loan industry continued to suffer devastating setbacks, the Congress undertook, in FIRREA, to shore up "public confidence in the savings and loan industry in order to insure a safe, stable, and viable system of affordable housing finance." H.R. REP. R. NO. 101-54(I) at 307 (1989), *reprinted in* 1989 U.S.C.C.A.N. 87, 103. The Congress streamlined the regulatory provisions, eliminated the FSLIC, expanded the FDIC's powers to include all insured depository institutions, and amended Section 1823(e) to protect the FDIC when acting as receiver. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, §§ 201, 212, 217, 103 Stat. 183, 188, 221, 254.[15] Section 1823(e) otherwise remained

14. Following its creation in 1989, the RTC also availed itself of *D'Oench* to bar affirmative claims, "whether sounding in contract or tort, when they are premised on an unwritten agreement." *Sweeney v. RTC*, 16 F.3d 1, 4-5 (1st Cir.), *cert. denied*, 513 U.S. 914 (1994).

15. The RTC's responsibility under FIRREA was to assume responsibility for thrifts that had been placed into conservatorship or (Cont'd)

substantively unchanged. 12 U.S.C. § 1823(e) (1990) (extending statute to FDIC "as receiver of any insured depository institution"); 12 U.S.C. § 1821(n)(4)(I) (extending statute to "bridge banks").

In 12 U.S.C. § 1821(d)(9)(A), the Congress partially codified the post-*Langley* precedent that had allowed the FDIC to invoke *D'Oench* as a defense against affirmative claims. Section 1821(d)(9)(A) provides that "any agreement which does not meet the requirements set forth in Section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the [FDIC]." The obvious intent was to "expand the protection given the FDIC when it acquires assets following a bank failure." *Striking a Balance, supra* at 151 n.158. Substantively, however, Section 1821(d)(9)(A) merely incorporated Section 1823(e) as a defense to claims against the FDIC.

B. *O'Melveny & Myers.*

In *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), the Court undertook to decide whether, in an action by the FDIC "as receiver of a federally insured bank, it is a federal-law or rather a state-law rule of decision that governs the tort liability of attorneys who provided services to the bank." *Id.* at 80-81. The FDIC's claims against the law firm for professional negligence and breach of fiduciary duty were based upon California law. *Id.* at 82-83. The FDIC sought to apply a federal common-law rule to the question "whether the knowledge of corporate officers acting against the corporation's interest will be imputed to the corporation." *Id.* at 83. Alternatively, if California law applied, the FDIC sought to apply federal common law to "the more narrow question whether knowledge by officers so acting will be imputed to the FDIC when it sues as receiver of the corporation." *Id.* (footnote omitted).

(Cont'd)
receivership (between January 1989 and December 1995) and the RTC accordingly was granted powers similar to those conferred on the FDIC. 12 U.S.C. § 1441a(b)(4)(A).

The Court rejected, as "plainly wrong," the notion that there should be "a special federal common-law rule divesting States of authority over the entire law of imputation." 512 U.S. at 83 (citation omitted). Addressing the question whether federal common-law should preempt the application of California's imputation law "to the FDIC suing as receiver," the Court held that "this is not one of those cases in which judicial creation of a special federal rule would be justified." *Id.* at 85, 87.

The FDIC asserted that FIRREA itself established the federal court's authority to promulgate common-law rules. 512 U.S. at 86.[16] The Court rejected the FDIC's argument that FIRREA "can be supplemented or modified by federal common law," observing that "[t]his argument is demolished by those provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver." 512 U.S. at 86 (citations omitted). Among the provisions identified as having created "special federal rules of decision" is 12 U.S.C. § 1821(d)(9), which section is described by the Court as "excluding certain state-law claims against FDIC based on oral agreements by the S&L." *Id.* There follows the invocation of *inclusio unius, exclusio alterius, id.* at 86 (in which Murphy seeks to find support for his position, see Brief for Petitioner at, *e.g.*, 10-13). The Court observed that "[t]o create *additional* 'federal common-law' exceptions is not to 'supplement' this scheme, but to alter it." 512 U.S. at 87 (emphasis added). Nonetheless, because the FDIC's predecessor receiver, the FSLIC, had been installed as receiver in 1986, three years prior to the enactment of FIRREA, the Court expressed its reluctance "to rest our judgment on FIRREA alone," and turned to the question whether the FDIC could make a case for creation of a rule of common law. *Id.* at 87, 89.

16. At oral argument, the FDIC's counsel analogized the proposed common-law imputation rule to the *D'Oench* doctrine, drawing from the Court the observation that FIRREA "was legislated against a background of federal common law," which included *D'Oench*. Oral Argument, *O'Melveny & Myers v. FDIC*, No. 93-489, 1994 WL 665048 *35-36 (Mar. 21, 1994).

Applying the principle that the power to *create* federal common law is "limited to situations where there is a 'significant conflict between some federal policy or interest and the use of state law,' " the Court found no such conflict:

> What is fatal to respondent's position in the present case is that it has identified no significant conflict with an identifiable federal policy or interest. There is not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity. The rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred. Uniformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty — but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in "federal common-law" rules.

512 U.S. at 87-88 (citation omitted). The Court also rejected the FDIC's argument that, because application of California law would defeat its action, the federal interest in maintaining the insurance fund authorized the creation of a common-law rule "because there is no federal policy that the fund should always win." *Id.* at 88.

There is no mention of *D'Oench* in the *O'Melveny* decision. Nor did the Court perforce announce any clearly-stated rule of law on the continuing viability of the doctrine. In *Murphy v. FDIC*, 61 F.3d 34 (D.C. Cir. 1995), however, the D.C. Circuit concluded that *O'Melveny & Myers* leads to the conclusion that the *doctrine* has been preempted by FIRREA. *Id.* at 38. Based entirely upon the inclusion of Section 1821(d)(9)(A) in the list of "special federal rules of decision" identified by the Court in *O'Melveny*, the D.C. Circuit concluded that this Court

"necessarily decided the *D'Oench* question" because "the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute — of which the *D'Oench* doctrine is one." 61 F.3d at 39.

C. *Motorcity I.*

The Eleventh Circuit addressed the continuing viability of *D'Oench*, as well as the D.C. Circuit's *Murphy* decision, in *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 83 F.3d 1317 (11th Cir. 1996) (*en banc*), *vacated and remanded, sub nom. Hess v. FDIC*, 519 U.S. 1087 (1997), *on remand*, 120 F.3d 1140 (11th Cir. 1997) (*en banc*), *cert. denied*, 523 U.S. 1093 (1998) (*Motorcity I*). The court commenced its analysis with a discussion of the relationship between *D'Oench* and Section 1823(e):

> As originally enacted in 1950, § 1823(e)(1) paralleled the facts of the *D'Oench* case itself: it applied only to the FDIC in its corporate capacity when it purchased bank assets from its receivership division. However, the federal policy expressed in the *D'Oench* decision "applies in virtually all cases where a federal depository institution regulatory agency is confronted with an agreement not documented in the institution's records." Courts therefore applied the federal common law *D'Oench* doctrine to protect certain entities not covered by the language of § 1823(e)(1) — including, for example, the FDIC as receiver, the [FSLIC], and transferees of assets (such as bridge banks) from banking regulatory agencies. Courts also applied the *D'Oench* bar to secret agreements between borrowers and a subsidiary of the failed financial institution under the regulatory agency's control. Furthermore, as originally enacted, § 1823(e)(1) generally applied only to preclude defenses raised by borrowers to avoid repaying their loans. Courts

> applied the federal common law *D'Oench* doctrine to bar the assertion of affirmative claims against the FDIC including claims sounding in tort.

83 F.3d at 1325-26 (citations omitted).

The court next addressed the question whether, as held by the D.C. Circuit, "the federal common law *D'Oench* doctrine has been preempted by statute." *Id.* at 1327. Beginning with the proposition that *D'Oench* "is a leading example of the Court's use of federal statutes to identify those 'uniquely federal interests' that require the creation of federal common law," *id.* at 1328, the court set forth the analytical framework for determining whether the doctrine had been supplanted by FIRREA:

> Because the application of federal common law is so closely tied to congressional intent, the task of determining whether a particular federal statute displaces existing federal common law requires courts to inquire carefully into the purposes of the legislation. Courts must be mindful that "the federal lawmaking power is vested in the legislative, not the judicial branch of government," and that federal common law is often merely a "necessary expedient" in instances in which "Congress has not spoken to a particular issue." Accordingly, courts should not require from Congress "the same sort of evidence of a clear and manifest purpose" to preempt as they require in considering whether a federal statute displaces state law. At the same time, "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." Therefore, although "Congress need not 'affirmatively proscribe' the common law doctrine at issue," its purpose to preempt existing federal common law at a minimum must be "evident."

Id. at 1329 (citations omitted).

The Eleventh Circuit rejected the D.C. Circuit's reliance on *O'Melveny & Myers*:

> We believe that *Murphy* erred in relying on *O'Melveny*. The question presented in *O'Melveny* was whether the federal courts should create a new federal common-law doctrine in an area in which Congress had not expressed any special concern, nor indicated that a special federal rule of decision should govern. In this case, the question presented *is not whether a new rule should be invented, but whether Congress intended to abrogate the previously-established federal common-law D'Oench doctrine*, which doctrine operates in an area of special federal concern as recognized by Congress, the Supreme Court, and the lower federal courts. The *O'Melveny* analysis does not apply to this question.

Id. at 1330 (emphasis added).

The court turned to *United States v. Texas*, 507 U.S. 529 (1993), to "provide[] the appropriate guidance for courts in their efforts to determine whether Congress intended that FIRREA abrogate the previously-established and longstanding federal common-law *D'Oench* doctrine." 83 F.3d at 1330. Applying the *Texas* analytical framework, the court recognized that Sections 1823(e)(1) and 1821(d)(9)(A) reflect that "Congress specifically carved out as an area of special federal concern the area involving the protection of the FDIC from secret or oral agreements." *Id.* at 1331 (footnote omitted). Accordingly, the court addressed the question "whether Congress intended §§ 1821(d)(9)(A) and 1823(e)(1) to eliminate the entire body of federal common law known as the *D'Oench* doctrine," *id.*, as follows:

> [T]he question in the instant case is whether or not it is "evident" that Congress intended to preempt the longstanding federal common law *D'Oench* doctrine. There is no indication in the statute or the legislative histories of either the 1950 or the 1989

> acts that Congress intended to preempt the federal common law. Just as it had done in 1950, Congress in FIRREA incorporated parts of the evolving common law *D'Oench* doctrine, *e.g.*, its application in both the corporate and receivership capacities, and its application to affirmative claims as well as defenses. Although the legislative history with respect to these two sections of the mammoth FIRREA is sparse, what little there is suggests that Congress intended no change in existing law.
>
> Significantly, neither FIRREA in general, nor §§ 1821(d)(9)(A) and 1823(e)(1) in particular, comprehensively address the substance of the federal common law *D'Oench* doctrine. . . . Congress did not focus on the range of secret agreements with respect to which the FDIC would be afforded protection. Rather, in this regard, the only relevant language is in § 1823(e)(1), which Congress merely carried over from the statute originally enacted in 1950. We therefore see no indication either in the language of the statue itself or in the legislative history that Congress undertook a comprehensive examination of the federal common law *D'Oench* doctrine, or made any attempt to address comprehensively that vast doctrine. "[S]uch reticence while contemplating an important and controversial change in existing law is unlikely. . . . At the very least, one would expect some hint of a purpose to work such a change, but there was none."

Id. at 1332 (citations omitted).

That the statute and the doctrine complement each other, as this Court recognized in *Langley*, also guided the Eleventh Circuit:

> The statute at issue began in 1950 as a partial codification of the *D'Oench* case. Subsequently, just as the *D'Oench* decision itself was a common law

rule fashioned to fill the interstices of federal statutes, courts continued to apply the common law *D'Oench* doctrine beyond the confines of the statutory language in order to fulfill Congress' purposes in enacting § 1823(e)(1). Thereafter, in the intervening forty years, the common law *D'Oench* doctrine and the cases under the statute evolved together, each drawing upon the other. The Supreme Court in *Langley v. FDIC*, interpreted the statute broadly in order to serve the purpose of the common law *D'Oench* case. Since the creation of § 1823(e)(1) in 1950, innumerable cases in every circuit court of appeals have held that the common law *D'Oench* doctrine and the statute continued to apply and complement each other. Thus, in 1989, when Congress addressed this special area of federal concern as a small part of the overall crisis in the banking industry, Congress was looking at forty years of harmonious coexistence of the common law doctrine and the statute. When Congress merely carried over the substance of the § 1823(e)(1) language, we believe that the most reasonable reading of the congressional intent is that Congress codified parts of the evolving *D'Oench* common law, left the state of the law unchanged, and left in place both the statute and the federal common law *D'Oench* doctrine to fill in the inevitable gaps left by the statutory language.

Id. at 1333.

The court accordingly concluded:

> [N]o language in the statute refers directly to the common law *D'Oench* doctrine. The only language in the statute even relevant to the issue . . . — the range of oral agreements with respect to which the FDIC will be protected — is found in § 1823(e)(1), and its language was merely carried over intact from prior law.
>
> * * *

> . . . Motorcity's construction would have the "anomalous effect" of undermining the purposes of FIRREA. . . . Such an interpretation would undermine the core purpose of both the *D'Oench* doctrine and its statutory cousins, *i.e.*, allowing the FDIC to make its necessary decisions and evaluations, which sometimes must be made with lightning speed, by relying on the written bank records.

83 F.3d at 1333-34. The court held that neither the 1950 nor the 1989 statutes preempted the *D'Oench* doctrine. *Id.*

D. *Atherton v. FDIC.*

The Court's decision in *Atherton v. FDIC*, 519 U.S. 213 (1997), arose from an action brought by the RTC, as receiver for a failed savings institution, against the bank's officers and directors for negligence and breaches of fiduciary duty. *Id.* at 215. Invoking 12 U.S.C. § 1821(k) (establishing "gross negligence" standard for liability of directors or officers of a federally-insured bank), the defendants obtained a dismissal of all claims, save those for gross negligence. *Id.* at 216. The Court was called upon to enunciate the appropriate legal standard for evaluating the behavior of the bank's directors and officers. *Id.* at 217.

The Court commenced its analysis "by temporarily setting the federal 'gross negligence' statute to the side, and by asking whether, were there no such statute, federal common law would provide the applicable legal standard." *Id.* at 217. The Court recognized that, in *Briggs v. Spaulding*, 141 U.S. 132 (1891), it had "articulate[d] federal common-law corporate governance standards, applicable to federally chartered banks." *Atherton*, 519 U.S. at 217. That decision, however, was quickly discarded — *not* because it was superseded or preempted by FIRREA, but because the Court determined that the federal common-law principle in that decision "did not survive this Court's later decision in *Erie R. Co. v. Tompkins*." *Id.* at 217, 226. Applying the rules that govern the question whether a *new* rule of common

law should be created by the federal courts, the Court determined that there was "no significant conflict with, or threat to, a federal interest" posed by the application of state law to determine the liability of directors or officers of a federally-insured banking institution. *Id.* at 217-26.

The Court then adverted to the question whether Section 1821(k) supplants state-law standards of care. 519 U.S. at 226. Relying on the statute's avowed purpose, the legislative history, and an express savings clause (providing that "[n]othing in this paragraph shall impair or affect any right of the Corporation under other applicable law"), the Court held that the statute establishes only "a 'gross negligence' floor," under the following analysis:

> Congress did not ask whether one looked to federal common law or to state law to find the liability standard applicable to federally chartered banks. Nor did it try to determine the content of federal common law. One can reconcile congressional silence on the matter with a "gross negligence" statute, the language of which brings all banks (federal and state-chartered) within its scope, simply by assuming that Congress, when enacting the statute, wanted to leave other law, including the law applicable to federally chartered banks, exactly where Congress found it. That, after all, is what the statute says. . . .

Id. at 227-31.

E. *Motorcity II*.

This Court remanded *Motorcity I* for further consideration in light of *Atherton*. *Hess v. FDIC*, 519 U.S. 1087 (1997). On remand, the Eleventh Circuit reinstated its original decision after analyzing *Atherton* and concluding that the *D'Oench* doctrine remains viable and is consistent with *Atherton*. *Motorcity of Jacksonville, Ltd. v. Southeast*

Bank, N.A., 120 F.3d 1140 (11th Cir. 1997) (*en banc*), *cert. denied*, 523 U.S. 1093 (1998) (*Motorcity II*).[17]

The court harmonized its holding in *Motorcity I* with *Atherton*:

> *Atherton* does not address the question of whether a federal statute abrogates a previously established and long-standing federal common law doctrine. It is true that the *Atherton* facts implicated the preexisting federal common law rule announced in *Briggs*. However, rather than addressing whether § 1821(k) displaced the *Briggs* rule, the Court explicitly set § 1821(k) to the side and addressed the different

17. Approximately one month after *Atherton*, as noted in Respondent's Brief in Opposition to Petition for Writ of Certiorari at 7-8, the FDIC announced a policy decision on the application of *D'Oench* and the pertinent provisions of FIRREA. Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver for Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership, 62 Fed. Reg. 5984 (Federal Deposit Insurance Corp. Feb. 10, 1997). Based upon its interpretation of *D'Oench* and the statutes, the FDIC determined that Sections 1823(e) and 1821(d)(9)(A) "bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the *D'Oench* doctrine." *Id.* Accordingly, the FDIC announced that it would continue to assert *D'Oench*, standing alone, only "for pre-FIRREA claims to the extent section 1823(e) (as it existed prior to FIRREA) is inapplicable" and, "[f]or claims that relate to agreements or arrangements entered into after the effective date of FIRREA, the FDIC will apply only sections 1823(e) (as amended by FIRREA) and section 1821(d)(9)(A) to bar claims not entered into in accordance with the enumerated requirements of section 1823(e) (as amended by FIRREA)." *Id.* On remand in *Motorcity*, the Eleventh Circuit noted that the FDIC had not asserted the Statement of Policy as relevant to the court's disposition of the issues, but that, "if the FDIC's position is correct, and if § 1821(d)(9)(A) applies to this case, then the FDIC would prevail without our needing to reach the preemption issue." *Motorcity II*, 120 F.3d at 1144 n.6.

issue of whether *Briggs* survived *Erie*. After concluding that *Briggs* did not survive, thus leaving no federal common law regarding the standard of care, the Court obviously never reached or addressed any issue of statutory abrogation of federal common law. Thus, in *Atherton*, as in *O'Melveny & Myers v. FDIC*, the Court's analysis focused on determining whether to create federal common law.

By contrast, the federal common law rule at issue in this case, the *D'Oench* doctrine, was first articulated by the Supreme Court in 1942, after *Erie*. The issue in this case therefore is not whether the *D'Oench* doctrine survived *Erie*, but rather whether Congress intended FIRREA to supplant the previously established and long-standing federal common law *D'Oench* doctrine. As explained in our previous *en banc* opinion, *United States v. Texas*, applies in this context and provides a presumption in favor of retaining existing federal common law unless a statutory purpose to the contrary is evident.

* * *

. . . [W]e decline to accept Motorcity's invitation to overrule *D'Oench*. With the *D'Oench* doctrine safely in place as a long-standing federal common law rule, we conclude that the appropriate analysis for the statutory abrogation issue presented in this case is that articulated in *United States v. Texas*, and not that articulated in *Atherton* and *O'Melveny*. We continue to believe that the analysis set forth in our prior *en banc* opinion reflects the most reasonable reading of Congress's intent — *i.e.*, that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year coexistence of the statute and the *D'Oench* doctrine.

Motorcity II, 120 F.3d at 1143-44 (citations and footnotes omitted); *accord, e.g., Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir.), *cert. denied*, 522 U.S. 928 (1997).[18]

The *Motorcity* decisions compelled the Eleventh Circuit's decision in Beck's favor on Murphy's appeal. *Murphy v. FDIC*, 208 F.3d 959, 963-69 (11th Cir. 2000). The court, applying *Motorcity* and other Eleventh Circuit precedents, restated its rejection of the D.C. Circuit analysis of Section 1821(d)(9), refused to allow Murphy — as a transferee from the D.C. Circuit — to import that circuit's rules of decision, and rejected Murphy's argument that the existence of a surplus in the Southeast receivership rendered *D'Oench* inapplicable. *Id.* at 963-68. Finally, the court addressed and rejected Murphy's argument that *O'Melveny & Myers* and *Atherton* support the abrogation of *D'Oench*. *Id.* at 967-69. Accordingly, the court concluded:

> [U]nder the *D'Oench, Duhme* doctrine, Murphy has failed to state a claim against the FDIC because he has not alleged a written agreement between Southeast and Orchid establishing their joint venture relationship, the *D'Oench, Duhme* doctrine remains

18. The Eighth Circuit, prior to *Motorcity I*, had accepted the D.C. Circuit's *Murphy v. FDIC* decision as a proper construction of the FIRREA enactments. *DiVall Insured Income Fund Limited Partnership v. Boatman's First National Bank of Kansas City*, 69 F.3d 1398, 1402 (8th Cir. 1995). The Third Circuit recently has also followed the D.C. Circuit's *Murphy* decision in *FDIC v. Deglau*, 207 F.3d 153, 170 (3d Cir. 2000). The First Circuit has elected not to address the question directly, *FDIC v. Houde*, 90 F.3d 600, 605 n.5 (1st Cir. 1996), but has heard *D'Oench* claims raised by an assignee of the FDIC. *Beal Bank, SSB v. Pittorino*, 177 F.3d 65, 68-69 (1st Cir. 1999). The Tenth Circuit has also declined to address the issue, *FDIC v. Noel*, 177 F.3d 911, 918 n.5 (10th Cir. 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 935 (2000), and the Ninth Circuit "assume[s]" that *D'Oench* remains viable (although that court declines to apply the doctrine in the particular situation where the FDIC acts as a receiver and merely "stands in the shoes of the insolvent bank"). *Ledo Financial Corporation v. Summers*, 122 F.3d 825, 829 & n.2 (9th Cir. 1997). This Court declined to review *Motorcity II*. *Hess v. FDIC*, 523 U.S. 1093 (1998).

> good law in the Circuit, and there is no sound reason not to apply the doctrine in this case.

Id. at 969.

III. The Eleventh Circuit Correctly Analyzed The Question Whether The *D'Oench* Doctrine Survives The FIRREA Statutes.

A. The Analytical Framework.

Beginning with *Erie*, the Court has taken great pains to implement a strict regime in the field of federal common law, allowing federal common-lawmaking — in the sense of judge-created law that is independent of any constitutional or statutory imperative — "only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630, 641 (1981) (footnotes omitted). *Atherton* reaffirmed those fundamental limitations:

> The Court has said that "cases in which judicial creation of a special federal rule would be justified . . . are . . . 'few and restricted.' " "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the federal courts. Nor does the existence of related federal statutes automatically show that Congress intended courts to create federal common-law rules, for " 'Congress acts . . . against the background of the total corpus juris of the states. . . .' " Thus, normally, when courts decide to fashion rules of federal common law, "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown." Indeed, such a "conflict" is normally a "precondition."

Atherton, 519 U.S. at 218 (citations omitted); *accord, e.g., O'Melveny & Myers*, 512 U.S. at 87; *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-08 (1988); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-28 (1979).

Murphy leans heavily on this body of law, insisting that the viability of the *D'Oench* doctrine must be determined as if the Eleventh Circuit created the rules of decision for this case out of whole cloth. Brief for Petitioner at 11-14. According to Murphy, application of these principles requires the conclusion that "[t]he FDIC-Receiver may not invoke the federal common law to defeat claims or defenses involving the rights of a bank in receivership." *Id.* at 13 (citing *O'Melveny & Myers*, 512 U.S. at 87).[19] Murphy is incorrect.

The proper starting point is *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981). There, the Court addressed the question whether the Federal Water Pollution Control Act Amendments of 1972, establishing "a new system of regulation" to govern the discharge of pollutants, under the auspices of the Environmental Protection Agency (EPA), supplanted federal common law so as to bar a nuisance claim arising from the discharge of pollutants into Lake Michigan. *Id.* at 307-12. The Court commenced its analysis by drawing the distinction between the *creation* and the *abrogation* of federal common law that was recognized by the Eleventh Circuit in the *Motorcity* decisions:

> Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision. The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress. *Erie* recognized as much in ruling that a federal court could not

19. Murphy acknowledges that "*O'Melveny* arguably involved a request for a 'new' rule," but insists that the issue is before this Court in that same posture. Brief for Petitioner at 22-24.

generally apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress.

When Congress has not spoken to a particular issue, however, and when there exists a "significant conflict between some federal policy or interest and the use of state law," the Court has found it necessary, in a "few and restricted" instances, to develop federal common law. Nothing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable. We have always recognized that the federal common law is "subject to the paramount authority of Congress." It is resorted to "[i]n absence of an applicable Act of Congress," and because the Court is compelled to consider federal questions "which cannot be answered from federal statutes alone." Federal common law is a "necessary expedient," and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.

Id. at 313-14 (citations omitted).[20] When the Congress "speak[s] directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the [statute] becomes meaningless." *Id.* at 315 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).[21]

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20. The Court cited Justice Jackson's concurring opinion in *D'Oench*. *Id.* at 314 (quoting *D'Oench*, 315 U.S. at 469 (Jackson, J., concurring)).

21. The Court distinguished the analysis that is appropriate to the question whether federal statutory law preempts state law, which

(Cont'd)

Finding that the amendments at issue "were viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation," and that the Congressional intent had been "to establish an all-encompassing program of water pollution regulation" — indeed, "the most comprehensive legislation ever developed in its field," 451 U.S. at 317-18, — with provisions that covered every claim sought to be raised under federal common law, *id.* at 319-25, the Court held that "no federal common-law remedy was available" to press a nuisance claim. *Id.* at 325-32.

Thereafter, in *Astoria Federal Savings and Loan Association v. Solimino*, 501 U.S. 104 (1991), the Court invoked the established rule of *Isbrandtsen Co. v. Johnson*, 343 U.S. 779 (1952), to set forth the analysis of when statutory preemption can be found:

> Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well established . . . the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except "when a statutory purpose to the contrary is evident."

501 U.S. at 108 (citations omitted). The *Astoria* language greatly influenced the Court's subsequent decision in *United States v. Texas*, 507 U.S. 529 (1993), the touchstone of the Eleventh Circuit's analysis of the determinative issue.

The question before the Court in *Texas* was whether the Congress, in the Debt Collection Act of 1982, had abrogated "the United States' federal common-law right to collect prejudgment interest on debts owed to it by the States."

(Cont'd)

question requires the federal courts to afford "due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy." *Id.* at 316-17.

507 U.S. at 530. The longstanding common-law principle at issue was that "parties owing debts to the Federal Government must pay prejudgment interest when the underlying claim is a contractual obligation to pay money." *Id.* at 533 (citations omitted). "Just as longstanding," the Court declared,

> is the principle that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." In such cases, Congress does not write upon a clean slate. In order to abrogate a common-law principle, the statute must "speak directly" to the question addressed by the common law.

Id. at 534 (citations omitted). The Court rejected Texas's argument that "this presumption favoring retention of existing law is appropriate only with respect to state common law or federal maritime law," *id.*, as follows:

> Although a different standard applies when analyzing the effect of federal legislation on state law, there is no support in our cases for the proposition that the presumption has no application to federal common law, or for a distinction between general federal common law and federal maritime law in this regard. We agree with Texas that Congress need not "affirmatively proscribe" the common-law doctrine at issue. But as we stated in *Astoria*, . . . "courts may take it as given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.' "

Id. at 534 (citations omitted).

The Debt Collection Act at issue in *Texas* empowered agency heads to charge "a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person." 31 U.S.C. § 3717(a)(1). The definition of a

"person" under the Act expressly excluded state and local governments. 31 U.S.C. § 3701(c). Accordingly, Texas asserted that the statutes established the Congress's intent "to relieve the States of their common-law obligation to pay prejudgment interest." 507 U.S. at 534-35. The Court rejected that argument:

> The only obligation from which § 3701 exempts the States is the obligation to pay prejudgment interest in accordance with the mandatory provisions of the Act. These impose a stringent minimum interest requirement upon private persons owing money to the Federal Government. The statute is silent as to the obligation of the States to pay prejudgment interest on such debts. We agree with the Solicitor General that "Congress's mere refusal to legislate with respect to the prejudgment-interest obligations of state and local governments falls far short of an expression of legislative intent to supplant the existing common law in that area."

Id. at 535 (footnote omitted). The Court observed that the Congress's "obvious desire to enhance the common law in specific, well-defined situations does not signal its desire to extinguish the common law in other situations." *Id.* at 535 n.4.

That the Court, in *O'Melveny & Myers*, had occasion to cite *City of Milwaukee* and *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981), for the proposition that it will not "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed" because "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law," *O'Melveny & Myers*, 512 U.S. at 85, does not serve to conflate disparate analytical frameworks, as suggested by Murphy. See Brief for Petitioner at 22-24. Rather, as this Court elucidated in *Texas*, addressing Congress's choice to

include only "persons" in the Debt Collection Act, the presumption is that Congressional silence leaves the law as it was:

> Congress in the Act tightened the screws, so to speak, on the prejudgment interest obligations of private debtors to the Government, and not on the States. It may be inferred from this fact that the former were the root of the Government's debt collection problems which inspired the Act. But it does not at all follow that because Congress did not tighten the screws on the States, it therefore intended that the screws be entirely removed. The more logical conclusion is that it left the screws in place, untightened.

507 U.S. at 537-38. Indeed, as previously noted, this Court endorsed that approach in *Atherton*, suggesting there that Congressional silence required the court to assume "that Congress, when enacting the statute, wanted to leave other law . . . *exactly where Congress found it*." 519 U.S. at 231 (emphasis added).[22]

22. Murphy's passing attempt to transform the inquiry into one that is appropriate when *state* law is purportedly displaced by a federal statute, Brief for Petitioner at 24-26, is entirely misdirected. Unlike the second question addressed in *Atherton*, *i.e.*, whether Section 1821(k) "[s]upplants any state-law standard of care," 519 U.S. at 226, the question before the Court in this case is whether *any* provision in FIRREA supplants an entire pre-existing *federal common-law doctrine*. What Murphy appears to be saying is that *Texas* is inapposite to the question whether a federal statute displaces or supplants federal common law when the federal common-law principle itself can be said to have displaced state law. No precedent is cited for this proposition, Brief for Petitioner at 24-26, and the creation of any rule so stating would seem to be inconsistent with the fundamental notion that the implementation of federal common law is primarily justified by the existence of "a *significant conflict* between some federal policy or interest and the use of state law." *O'Melveny & Myers*, 512 U.S. at 87 (emphasis added). Murphy's argument would thus simply write *Texas* out of existence.

B. Application of the *United States v. Texas* Standard.

1. Congressional intent.

In *Motorcity I*, the Eleventh Circuit applied the *Texas* principles as follows:

> We conclude that it is even clearer in this case than in *Texas* that Congress did not intend to preempt the prior federal common law *D'Oench* doctrine. Texas held that the statute did not "speak directly" to the issue, notwithstanding the fact that the statute addressed the area of the government's debt collection and addressed prejudgment interest in particular, and notwithstanding the fact that Congress expressly excluded states from the operation of the statute. In the instant case, no language in the statute refers directly to the common law *D'Oench* doctrine. The only language in the statute even relevant to the issue presented by *Motorcity* — the range of oral agreements with respect to which the FDIC will be protected — is found in § 1823(e)(1), and its language was merely carried over intact from prior law.

Motorcity I, 83 F.3d at 1333.[23]

In challenging this analysis, Murphy argues that the "detailed legislative treatment of the effectiveness of unwritten agreements suggests that Congress extended protection to such parties and such claims as it thought proper, and declined to go further." Brief for Petitioner at 19. To be sure, the enactment of "a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *City of Milwaukee*, 451 U.S. at 319. Here, regardless whether FIRREA fairly can be characterized, in an overall sense, as

23. The court adhered to this ruling on remand from this Court to reconsider its decision in light of *Atherton*. *Motorcity II*, 120 F.3d at 1143.

"comprehensive," no intent to supplant the common-law *D'Oench* doctrine can be deduced.

This is so because the keystone provision — Section 1823(e) — *was not substantively amended* by FIRREA in 1989. Section 1821(d)(9)(A) does not purport to define, much less to restrict, the range of secret agreements as to which that provision may be invoked when an affirmative claim is brought against the FDIC. Rather, "[t]he substance of § 1823(e) — *i.e.*, the range of secret agreements prohibited by the statutes — *was left untouched*" by the Congress in 1989. *Motorcity I*, 83 F.3d at 1327 (footnote omitted; emphasis added). The only reasonable conclusion is that the Congress elected to expand the *contexts* in which the FDIC could invoke Section 1823(e), leaving alone the *substantive* scope of the *D'Oench* doctrine.

As briefly noted earlier, see n.17, the FDIC certainly has so construed the statutes:

> In the FDIC's view, Congress intended that section 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine. Accordingly, . . . these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), *regardless of whether a specific asset is involved*, to the same extent that such claims would be barred by the *D'Oench* doctrine.

Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver for Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership, 62 Fed. Reg. 5984 (Federal Deposit Insurance Corp. Feb. 10, 1997) (emphasis added).

The FDIC has been charged with acting pursuant to the *D'Oench* doctrine since 1942, and with administering the

pertinent statutes since 1950.[24] Its interpretation of the interaction between the statutes and the common-law doctrine certainly has the "power to persuade" and should be taken into serious account. *Christensen v. Harris County*, __ U.S. __, 120 S. Ct. 1655, 1663 (2000).

2. Applying the *Texas* presumption to the *D'Oench* doctrine.

Murphy's final line of defense to the application of the *Texas* presumption is that the *D'Oench* doctrine, as of the enactment of FIRREA in 1989, was "a mongrel descendant" of the *D'Oench* decision, Brief for Petitioner at 3, and was either: (i) "invalid federal common law," (ii) preempted by the 1950 adoption of Section 1823(e), or (iii) lacking in "the common-law credentials of the original decision." *Id.* at 16 & n.6, 21, 23 n.10, 26-29. Reduced to its essence, Murphy's argument is that this Court should overrule *all* federal decisions applying the *D'Oench* doctrine to any set of circumstances beyond those of *D'Oench* itself, *i.e.*, secret agreements raised in defense of a claim brought by the FDIC in its corporate capacity with regard to a specific asset acquired by the FDIC. Murphy's manifest motivation is to cut loose the common-law moorings of virtually all post-*D'Oench* decisions and thereby evade application of the *Texas* presumptions.

The asserted "invalidity" of the *D'Oench* doctrine rests on the notion that the "wayward *extensions*" of the original *D'Oench* decision by the courts of appeals, particularly the application of the doctrine to the FDIC, in its receivership capacity, as a defense against affirmative claims, serves "nothing

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24. As the Eleventh Circuit remarked in *Motorcity II*, if the FDIC's position is correct and it is taken to its logical extent, the entire question whether FIRREA preempted the *D'Oench* doctrine is essentially moot. *Motorcity II*, 120 F.3d at 1144 n.6. The Court, however, need not go nearly that far; the FDIC's analysis of Sections 1823(e) and 1821(d)(9)(A) serves well as a guidepost for resolving the more straightforward question whether the doctrine survives in the first instance.

remotely resembling a significant federal interest." Brief for Petitioner at 15-16 (original emphasis). But the Congress clearly disagrees.

As previously discussed, Section 1823(e) was amended in 1989 (and presently exists as 12 U.S.C. § 1823(e)(1)) to provide that "[n]o agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase *or as receiver of any insured depository institution*, shall be valid" unless the writing and recording requirements of the statute are satisfied. 12 U.S.C. § 1823(e)(1) (emphasis added). Similarly, Section 1821(d)(9)(A) imports the requirements of Section 1823(e) and provides that "any agreement which does not meet the requirements" of that section "shall not form the basis of, or substantially comprise, a claim *against the receiver or the Corporation*." 12 U.S.C. § 1821(d)(9)(A) (emphasis added). By providing for the FDIC's entitlement to use the *D'Oench* doctrine as a defense, both in its corporate and receivership capacities, the Congress plainly was codifying the pre-existing *D'Oench* common law. *Motorcity I*, 83 F.3d at 1326-27.

Moreover, no court of appeals has ever accepted the distinction that Murphy asks this Court to draw between the FDIC in its corporate capacity and its receivership capacity. *See RTC v. Dunmar Corp.*, 43 F.3d at 596 n.5 (collecting cases).[25] There is good reason for this unexceptional application of the doctrine. First, in *D'Oench* itself, this Court alluded to the potential application of the doctrine to the FDIC as receiver, *D'Oench*, 315 U.S. at 458 ("the rule which prevents an accommodation maker of a note from setting up the defense of

25. Those courts that have accepted the primary premise of Murphy's argument, *i.e.*, that FIRREA has supplanted *D'Oench*, either wholly or in part, also have foreclosed application of the common-law extension of *D'Oench* to the FDIC as receiver. *See FDIC v. Noel*, 177 F.3d 911, 918 n.5 (10th Cir. 1999) (collecting cases), *cert. denied*, __ U.S. __, 120 S. Ct. 935 (2000).

no consideration against a bank *or its receiver or creditors* is not delimited to those instances where he has committed a statutory offense"; an "accommodation maker is not allowed that defense *as against the receiver of the bank* and its creditors . . . where his act contravenes a general policy to protect the institution of banking from such secret agreements") (emphasis added), thus leading the first court squarely to address the question to reject the contention that *D'Oench* cannot apply to the FDIC as receiver:

> Appellants also seek to distinguish *D'Oench* on the grounds that the FDIC was there proceeding as a creditor of the bank, whereas it is here proceeding as a receiver of the bank. The express language of the Court in *D'Oench*, which refers to receivers as well as creditors, precludes this distinction.

FDIC v. First National Finance Co., 587 F.2d at 1012 (citing *D'Oench*); *accord, Expansion of D'Oench, supra* at 772 ("[a]lthough *D'Oench* technically involved the FDIC acting only as a federal corporation, based upon the Court's reliance on the state common law estoppel cases (which invariably involved state receivers), *D'Oench* would logically seem to apply to the FDIC in its receivership capacity as well").

Second, the exception urged by Murphy would swallow the rule. If the FDIC, in its receivership capacity, cannot use *D'Oench* to defend against affirmative claims based upon secret agreements, the FDIC's right to invoke the doctrine in bringing claims against a borrower would become wholly illusory. A borrower could recoup the monies sought by the FDIC simply by bringing an unbarred counterclaim based upon a secret agreement. *Hall v. FDIC*, 920 F.2d at 340 ("the effect of such an approach would be to reduce actions Congress has allowed the FDIC to approach to nullities since defendants could counterclaim and recover what they lost").[26]

26. This practical recognition of the need to extend *D'Oench* to the FDIC as receiver — and this Court's declaration of policy in *Langley* — convinced the Eleventh Circuit to depart from its holding in *Gunter*

(Cont'd)

Murphy offers no cogent rationale for departing from this rule.

Murphy's second contention is that the *D'Oench* doctrine was actually overruled in *1950*, when the Congress first adopted Section 1823(e). Brief for Petitioner at 16 n.6, 23 n.10. As discussed in Point I.B., *supra*, no court has ever held in accordance with Murphy's view, and all authority is — and always has been — to the contrary. *See Motorcity II*, 120 F.3d at 1144 n.6; *Motorcity I*, 83 F.3d at 1332.[27] The reenactment of Section 1823(e) in 1989, without substantive change, Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 217(4), 103 Stat. 183, 256, can be seen only as Congressional acceptance of the prior interpretations of the 1950 enactment, *e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994); *Pierce v. Underwood*, 487 U.S. 552, 567 (1988); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), and the 1950 statute therefore

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v. Hutcheson, 674 F.2d at 872-73, that the FDIC may invoke *D'Oench* as a bar to fraud defenses only in its corporate capacity. *FSLIC v. Two Rivers Associates*, 880 F.2d at 1276-77 ("the reasoning behind *D'Oench, Duhme* requires that it be applied to protect the FDIC and the FSLIC regardless whether the regulatory body is acting in its capacity as a receiver or as a corporate insurer").

27. Murphy's *ipse dixit* argument seeks support in this Court's *Langley* decision. Brief for Petitioner at 20 (*Langley* "suggests that the federal common-law *D'Oench* doctrine did not separately survive even its 1950 codification"). But this Court was not called upon to address the question whether *D'Oench* remained valid after 1950 and did not purport to do so. The passage upon which Murphy relies speaks to the question whether the FDIC's alleged knowledge of a secret agreement can suspend operation of the *D'Oench* doctrine, and does not even touch upon the interaction of the doctrine and the statute. 484 U.S. at 95. Murphy necessarily ignores the Court's express acknowledgment of the continued vitality of *D'Oench* as the wellspring for defining the scope of unenforceable secret agreements under Section 1823(e). 484 U.S. at 92-3.

cannot be construed, as Murphy would have it, as the "demise" of *D'Oench*. Brief for Petitioner at 16 n.6.[28]

In his penultimate position, Murphy argues that the post-1978 applications of *D'Oench* "lack the common-law credentials of the original decision," that this Court (with the exception of *Langley*) has not spoken to *D'Oench* and has not approved the decisions of the courts of appeals, and that the common law is thus insufficiently "well established" to invoke the *Texas* presumption. Brief for Petitioner at 26-29. As Murphy apparently sees it, this Court's *decision* in *D'Oench* may be sufficiently "long in the tooth" for invocation of the *Texas* presumption, but *none* of the *D'Oench* progeny from 1978 through 1989 is sufficiently "aged" or "familiar." Brief for Petitioner at 26. This argument reflects a fundamental misconception as to the very nature of common law.

"It has been said so often as to become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Lutwak v. United States*, 344 U.S. 604, 615 (1953) (citation omitted). The *D'Oench* doctrine has developed in accordance with this axiom and, as Beck has set forth, each of the permutations derives from the policy underlying that decision — and particularly as reinforced and refined by this Court's *Langley* decision. Murphy cites no authority for a "partial" invocation of the *Texas* presumption, whereby one or two pieces of an established common-law doctrine are preserved while others are picked

28. The practical implications of a declaration, some 50 years later, that a statutory enactment displaced *D'Oench*, should not be lightly overlooked. Following the enactment of Section 1823(e) in 1950, "the common law *D'Oench* doctrine and the cases under the statute evolved together, each drawing upon the other," *Motorcity I*, 83 F.3d at 1333, as is perhaps most clearly shown by this Court's *Langley* decision. A holding that the statute caused the "demise" of *D'Oench* in 1950 would require the federal courts to engage in the impossible task of parsing each of the precedents to determine which aspects were solely based upon Section 1823(e), so as to eschew reliance on any common-law rulings.

off as insufficiently "aged" or "familiar."[29] Murphy cannot avoid the controlling federal common law.

C. The Applicability of *D'Oench* to Successors.

Throughout his brief, Murphy attempts to recast this litigation as a dispute between two *private parties*, ultimately arguing that the case "affects only the shareholders of the Bank and petitioner Murphy, and does not even remotely implicate significant federal interests." Brief for Petitioner at 15. Thus, the survival of the *D'Oench* doctrine notwithstanding, Murphy would have the Court disavow application of the doctrine to the FDIC's successors.

Even *D'Oench*'s critics have failed to question extending the doctrine's protections to the FDIC's successors. *Expansion of D'Oench, supra* at 773 (including successors within *D'Oench*'s protection "is logical given the fact that the underlying justification for the *D'Oench* rule is illegality (*i.e.*, public policy) and therefore third parties who are not *in pari delicto* should be allowed to avail themselves of the rule"). Application of the common-law doctrine to successors in interests has been a completely non-controversial development in *D'Oench* jurisprudence. *E.g., First Union National Bank of Florida v. Hall*, 123 F.3d 1374, 1379 & n.8 (11th Cir. 1997), *cert. dismissed*, 523 U.S. 1135 (1998); *FSLIC v. Griffin*, 935 F.2d 691, 696 (5th Cir. 1991); *Castleglen v. RTC*, 984 F.2d 1571, 1576-77 (10th Cir. 1993).[30]

29. This Court, as the ultimate maker of federal common law, is fully empowered to revisit its common-law doctrines and to make such revisions as are deemed appropriate. Beck believes that there is nothing in the modern *D'Oench* jurisprudence that would warrant reconsideration, and, indeed, Murphy does not appear to seek such relief. But, in any event, that would not be the same thing as the doctrinally-unsupported selective invocation of the *Texas* presumption that is sought by Murphy.

30. The Fourth Circuit has suggested that assignees are within the scope of Section 1823(e), *Federal Financial Co. v. Hall*, 108 F.3d 46, 49-50 (4th Cir.), *cert. denied*, 522 U.S. 858 (1997), and the Eighth Circuit (after having adopted the D.C. Circuit's *Murphy* rationale) (Cont'd)

But the Court should have no occasion to reach that question here. Murphy brought his action *against the FDIC* and it was the *FDIC's motion to dismiss* that was heard and addressed by the district court. In what was nothing more than an accident of timing, Beck, as successor agent, was substituted as the party defendant for the FDIC in the Southern District of Florida while the motion to dismiss was pending.[31] Had this Court been presented with the case, either from the D.C. Circuit or the Eleventh Circuit, prior to Beck's substitution, there would have been *no* issue as to successors under *D'Oench* — and there should be none now. The question before the Court remains whether *D'Oench*, as a common-law doctrine applicable to the FDIC to defend against affirmative claims based upon unwritten agreements, survives FIRREA. Because, as has been set forth in this brief, the answer should be that *D'Oench* does indeed survive as a "safety net" to ensure that the beneficial purposes of the FIRREA statutes are fully realized, the Eleventh Circuit's decision should be affirmed.

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declined to reach the question whether successors are entitled to protection under Section 1823(e) and tolerated the district court's ruling that the statute applies to successors. *Kessler v. National Enterprises, Inc.*, 165 F.3d 596, 599 n.2 (8th Cir. 1999). The First Circuit, which had elected not to address the question whether *D'Oench* survives as a common-law doctrine independent of FIRREA — *e.g., FDIC v. Houde*, 90 F.3d at 605 n.5 — treats Section 1823(e) and *D'Oench* as a single doctrine and has heard *D'Oench* claims raised by an assignee of the FDIC. *Beal Bank, SSB v. Pittorino*, 177 F.3d at 68-69.

31. *See* 12 U.S.C. § 1297 (successor agent assumes responsibilities of FDIC as receiver).

CONCLUSION

Based upon the foregoing, Beck respectfully requests the Court to affirm the Eleventh Circuit's decision in all respects.

Respectfully submitted,

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